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No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 11) is reported in 68 C. Cls. 97, ~~33 F. (2d) 305~~.

JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1929. (R. 21.) A motion for a new trial was overruled on December 2, 1929. (R. 22.) Petition for certiorari was filed February 28, 1930 (R. 22), and certiorari was granted March 17, 1930 (R. 23). 281 U. S. 709. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

Suit was instituted to recover income and profits taxes assessed against the respondent for the year 1917 and paid by the application of credit from an overpayment of taxes for the year 1918. The respondent is entitled to recover the sum sued for, $498,961.29, provided its claim for refund of the tax involved was filed within the time required by Section 284 (b) (1) of the Revenue Act of 1926 (p. 16, *infra*); that is, within four years "from the time the tax was paid." Inasmuch as payment of the 1917 tax was effected by the application of a credit, the case turns on the date of payment by such application.

One question presented is whether the 1917 tax was paid when the Collector entered the application of the credit on his records or when he certified to the Commissioner that he had done this or when the Commissioner subsequently signed the schedule of refunds and credits authorizing the refund of that part of the overpayment not used as a credit.

The respondent filed two claims for refund—one on February 28, 1923, and another on September 3, 1927, which the respondent maintains was an amendment of the first claim. The Government admits that the respondent would be entitled to recovery on the grounds stated in the second claim, filed September 3, 1927, had it been filed in time, but inasmuch as the ground stated in that claim is

different from that stated in the former, it contends that the second claim can not be considered as an amendment of the first. The Court of Claims sustained the Government's contention on this point.

The question presented under this point is whether the second claim filed on September 3, 1927, can be regarded as an amendment of the first claim so that the second claim will relate back to the date of the first claim, February 28, 1923.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 16–19.

STATEMENT

On February 28, 1923, the respondent filed a claim for refund of income and excess profits taxes for the year 1917 in the sum of $844,695.54. (R. 13; Exhibit A, R. 8.) This claim asserted four different grounds, each one apparently having no relation to the items comprised in the others. One of the grounds was thus expressed: "Foreign-exchange adjustments and foreign dividends overstated." (R. 9.) On this point the contention made before the Commissioner was that a dividend received from the Compania Swift de Montevideo, a foreign corporation, should be treated as income for 1916 and prior years and should be taxed at 1916 rates instead of at 1917 rates. (R. 13.) The contention that any part of the amount taxed was not taxable because it was a stock dividend was not

suggested in the claim, and it was not made before the Commissioner under this claim. (R. 13, VIII.) This claim was rejected on April 24, 1926. (R. 13.)

On September 3, 1927, the respondent filed what it described as an amended claim for the refund of $498,961.29 of its income and excess-profits taxes paid for the year 1917, expressly based upon the contention that the dividend received from the Compania Swift de Montevideo was a stock dividend and not taxable. (R. 14; Exhibit B, R. 10.) This second claim stated, among other things: "Deponent paid the income and war excess-profits taxes assessed against it for the year 1917 on different dates. One such payment, $2,813,012.05, was made on September 6, 1923." This latter claim has not been acted upon by the Commissioner. (R. 17.) The Government contends that it was filed more than four years after the 1917 tax was paid.

The question which this contention raises is—at what point in the administrative procedure is a tax paid, when payment is made by means of the application of a credit for overpayment for another year. The facts bearing on this question follow.

On February 9, 1923, the Commissioner of Internal Revenue, in accordance with the procedure then in effect, signed and forwarded to the Collector of Internal Revenue a schedule of reductions of tax liability on Form 7777, in which was included an overassessment of income and profits

taxes of the respondent for the year 1918. (R. 16.)

The certificate of the Commissioner on Form 7777 directed the Collector to check the accounts of the taxpayers whose names appeared on the schedule, to determine whether or not their liabilities should be reduced by abatements and if so to make such abatements. (R. 14.) With reference to credits, he directed the Collector as follows (R. 14):

> If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war-profits and excess-profits taxes only.)

He further directed the Collector as follows (R. 14):

> The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777 A) and an appropriate memorandum made upon the taxpayer's account.

Before the Collector returned the schedule to the Commissioner, Form 7805–A, a Schedule of Refunds and Credits was adopted and was in use in place of the Schedule of Refunds, Form 7777–A. (R. 16, 17.)

On July 25, 1923, the Collector returned Form 7777 to the Commissioner with Form 7805–A, on which he reported that after abating a portion of the overassessment for 1918 he had applied another portion as a credit against an additional assessment for 1917 and that the balance remaining was refundable. (R. 16.)

On September 6, 1923, the Commissioner signed the authorization to the disbursing clerk on Form 7805–A, authorizing the disbursing clerk to pay the amounts shown on such schedule to be refundable together with accrued interest, if any. (R. 15, 16.)

Certificates of overassessment addressed to the taxpayers were forwarded to the Collector at or about the same time that schedules of reduction of tax liability (i. e., the schedules of overassessment) were forwarded to him, but they were not mailed to the taxpayers until after the Commissioner signed the authorization to the disbursing clerk on Form 7805-A. The certificate of overassessment, sent to the respondent on September 26, 1923, was the only communication sent to it notifying it of the allowance of the credit. (R. 15, 16.)

The Court of Claims held that the second claim was based on a ground not suggested by the first claim and therefore was not an amendment of the first claim, but that the 1917 taxes were not paid by credit until the Commissioner signed the authorization to the disbursing clerk to pay the amounts

which appeared to be refundable on the schedule of refunds, and therefore that the second claim was filed in time, i. e., within four years "from the time the tax was paid" as required by Section 284 (b) (1) of the Revenue Act of 1926 (pp. 16–17, *infra.*)

SPECIFICATION OF ERROR

The Court of Claims erred in holding that the claim for refund of the 1917 taxes involved in this suit was filed within four years after the payment of the 1917 taxes was made through the allowance of a credit against them for an overpayment of 1918 taxes.

SUMMARY OF ARGUMENT

The 1917 tax was paid by credit on or before July 25, 1923, when the Collector certified to the Commissioner that he had applied an overpayment for 1918 as a credit against the 1917 assessment. The tax was paid when, by entering the credit on his records, the Collector extinguished the tax indebtedness of the respondent. The claim for refund dated September 3, 1927, was filed more than four years after the payment of the tax and no recovery can be had under it.

The court below was correct in holding that this claim can not be regarded as an amendment of the first claim for refund so as to date back to the date of that first claim—February 28, 1923.

ARGUMENT

I

THE 1917 TAX WAS PAID BY CREDIT MORE THAN FOUR YEARS PRIOR TO THE FILING OF THE CLAIM FOR REFUND DATED SEPTEMBER 3, 1927, AND NO RECOVERY CAN BE HAD UNDER THAT CLAIM

Section 284 of the Revenue Act of 1926, *infra*, pp. 16–17, provides that "where there has been an overpayment * * * the amount of such overpayment shall * * * be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, * * *" and that "No * * * refund shall be allowed * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed * * *."

The 1917 tax was paid by credit.[1] The respondent contends that it was not paid until the Commissioner on September 6, 1923, signed the order to the disbursing clerk to pay the amounts shown to be refundable on the schedule of refunds to those taxpayers named on the schedule. It contends that this was both the date of the allowance of the credit and the date of payment by the credit.

The Government contends that payment by credit took place when the taxpayer's liability for the

[1] The credit was not void under Section 609 of the Revenue Act of 1928, *infra*, p. 18, for it does not appear in the record that, prior to the application of the overpayment as a credit, payment of the 1917 tax or refund of the 1918 overpayment was barred by the statute of limitations.

1917 tax was extinguished. This indebtedness was shown on the records of the Collector. The taxpayer could have discharged the obligation by payment of the tax in cash at the Collector's office. Instead of paying cash, it was relieved of the tax liability by having an overpayment of tax for 1918 set off against its 1917 tax obligation. This was accomplished by the Collector making the appropriate entries in his records. When this had been done, the Collector certified to the Commissioner, on July 25, 1923, that the amounts had been entered as credits against the respondent's 1917 and other assessments. The tax liability then was as completely discharged as if the respondent had paid cash.

The subsequent signing of the schedule of refunds and credits was not in any sense a payment, for the tax had already been paid by application of the credit. In the Government's brief in the *Boston Buick Co.* and *Iron Cap Copper Co.* cases, Nos. 42 and 43, October Term, 1930, the character of this subsidiary schedule is discussed and it is argued at length that it must be signed *after* the credit has been allowed. That argument is equally applicable to this case.

There are no other cases which decide this identical question. But the date of payment of a tax by credit has been the subject of judicial opinion. That the tax was paid when the Collector entered the credit on his records is the only view in accord

with the language of two court decisions holding that, where collection of a tax is barred by the running of the statute of limitations, application of a credit to discharge the tax obligation is barred also. In these cases the question was as to the date of collection; in the instant case it is as to the date of payment. But the same act is collection and payment. In *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. (2d) 459 (N. D. Ohio), the court concluded:

> My opinion is that the statute had run against the collection of the second additional assessment for 1917, and that the action of the collector in October, 1924, crediting the refund for 1918 against the second additional assessment for 1917 was tantamount to the method of tax collection held by the Supreme Court to be prohibited after the expiration of the time limited by statute.

Equally pertinent is the following language of the court in *Brady* v. *United States*, 24 F. (2d) 205 (D. Mass.):

> In the Brady case a refund owed to a taxpayer was not paid to him, but was credited against an uncollected tax outlawed by the statute of limitations then in force. * * *
>
> * * * * *
>
> The Brady tax was "collected" by the bookkeeping entry just as illegally as if there had been a suit or a process of distraint. * * *

The Court of Claims itself said in its opinion (rendered after that in the instant case) in *Boston Pressed Metal Company* v. *United States*, 42 F. (2d) 312, now before this Court on another point as No. 337, October Term, 1930:

> When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned was in law the same as if the collector had received cash from the plaintiff; * * *.

In the instant case we submit that the entries were made and the tax paid on or before July 25, 1923, and that the claim for refund of September 3, 1927, was not filed within four years from the time the tax was paid, as required by Section 284 (b) (1) of the Revenue Act of 1926, pp. 16–17, *infra*).

II

THE 1923 CLAIM FOR REFUND CAN NOT SUPPORT THIS SUIT, NOR WAS THE 1927 CLAIM AN AMENDMENT OF THE EARLIER ONE SO AS TO DATE BACK TO THE DATE OF THAT FIRST CLAIM

Section 3226 of the Revised Statutes, reenacted in Section 1113 of the Revenue Act of 1926 (*infra*, p. 17), provides that "no suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax * * * until a claim for refund or credit has been duly filed * * * according to the provisions of law in that regard, and

the regulations of the Secretary of the Treasury * * *." Regulations 62, in force when the first claim for refund was filed, provided in Article 1036 (*infra*, pp. 18–19), that "all the facts relied upon in support of the claim should be clearly set forth."

In *Tucker* v. *Alexander*, 15 F. (2d) 356, the Circuit Court of Appeals for the Eighth Circuit said (p. 357):

> The evident purposes and objects of this condition [filing of claim] are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated.

The reversal of this decision by this Court, 275 U. S. 228, was upon another ground and does not affect this portion of the opinion.

The first claim did not specify the contention made in the "amended" claim, and that contention was not made before the Commissioner under the first claim. (See pp. 3–4, *supra*.) The claim was signed February 28, 1923, nearly three years after the decision of this Court on March 8, 1920, in *Eisner* v. *Macomber*, 252 U. S. 189, that stock dividends are not taxable as income. The respondent had every opportunity to raise this ground, but neglected to do so. We contend that the first claim

can not support the present suit for it gave the Government officials no indication that a refund would be sought on the ground that a stock dividend was erroneously taxed. *Red Wing Malting Company* v. *Willcuts,* 15 F. (2d) 626, 634 (C. C. A. 8th), certiorari denied 273 U. S. 763. See *Tucker* v. *Alexander,* 275 U. S. 228, 231, *supra.*

But the respondent contends that the real ground for refund was set out in the second claim for refund and that the second claim should be treated as an amendment of the first claim, and hence that the situation is the same as if the real ground for refund had been called to the attention of the Government officials in February, 1923. This second claim set up an entirely new basis for refund. The situation is similar to that presented by an amended declaration which seeks to introduce a new cause of action or to bring in new parties defendant. In contemplation of the statute of limitations, such an amendment does not date back to the original declaration, but is equivalent to a new declaration. *Miller* v. *McIntyre,* 6 Pet. 61; *Sicard* v. *Davis,* 6 Pet. 124. See also *Seaboard Air Line Railway* v. *Renn,* 241 U. S. 290.

That the second claim is not an amendment of the first is further shown by the fact that the claim states that the money, of which the respondent seeks refund, was paid on September 6, 1923 (R. 11), which was after the date of the original claim. A claim for refund can relate only to taxes paid prior

to the date of the claim. *Rock Island Railroad Co.* v. *United States*, 254 U. S. 141. The following language of this Court in *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205, is applicable:

> We think there is no ground for this contention to rest on. No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid. It is not pretended that since the payment of the tax by the plaintiff any one of the steps required by the law and regulations to make an effectual claim for the refunding of the tax has been taken. All the safeguards prescribed by the Secretary of the Treasury for the protection of the public interests, in his regulations respecting claims for the refunding of taxes, have been disregarded. There has been no claim whatever in the sense of the law.

The only claim setting out a valid ground for refund of the taxes now sought to be recovered was filed on September 3, 1927. This, we submit, was more than four years after payment of the taxes, and is therefore ineffective as a basis for this suit.

CONCLUSION

The decision of the court below was erroneous, and its judgment should be reversed.

Respectfully submitted.

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DECEMBER, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116, provides in part:

> SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a

claim therefor is filed by the taxpayer; and * * * (U. S. C. App. Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. Title 26, Sec. 156; U. S. C. App. Title 26, Sec. 156.)

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provides in part as follows:

> SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.
>
> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)
>
> SEC. 609. ERRONEOUS CREDITS.
>
> (a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.
>
> (b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
>
> (c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C. Sup. III, Sec. 2609.)

Article 1036 of Treasury Regulations 62, promulgated February 15, 1922, under the Revenue Act of 1921, provides:

> CLAIMS FOR REFUND OF TAXES ERRONEOUSLY COLLECTED.—Claims by the taxpayer for the refunding of taxes and penal-

ties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

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